

SEP 25 2006

September 19, 2006

Mr. William H. Davenport
Chief, Investigations and Hearings Division
Enforcement Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 4-C330
Washington, D.C. 20554

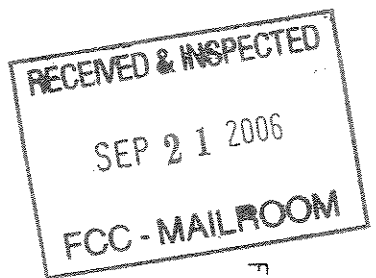
Dear Mr. Davenport:

This letter constitutes my comments concerning the FCC decisions appealed to the U.S. Court of Appeals for the Second Circuit and remanded to the FCC on September 7, 2006. The FCC docket number prior to the court appeal was FCC 06-17. These Comments are in accordance with the procedures announced by the FCC also on September 7, 2006, which I obtained from your website. I am enclosing this original and four copies. It is not practical for me to e-mail a copy as I do not have a computer with a scanner or that capacity.

I am mailing these comments to you on today's date via overnight mail to ensure that they are received by you no later than the September 21 deadline.

First, in addition to being a U.S. citizen, I am the Probate and Family Judge for the Sixth Probate Court of Michigan, for the past thirteen years. I handle juvenile cases, and have seen firsthand the irreparable harm to minors from indecent media. In fact, I have had over a dozen cases in which it was proven to our court beyond any shadow of a doubt that an adult or older teenager raped or otherwise sexually assaulted another person, including young children, for the sole and direct reason that they had seen simple nudity in "R" rated movies, sometimes just in one movie, or in Playboy magazine, causing them to become curious to the point of molesting another. I can and would testify under oath to the foregoing.

Beyond that, my comments are made as a citizen. Further, they are not pertaining to the specific TV shows that were found to be indecent by the FCC. But given that in the U.S. Court of Appeals case, the petitioner networks have filed written statements that I have reviewed, hinting that they want to use the court appeals to try to get the court to somehow find that the broadcast indecency has now mysteriously become unconstitutional, my comments are for that purpose, to become part of the record to be considered.



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I submit my comments in outline form.

I. Given that petitioners place great reliance on an argument based on the "V-chip", which relies entirely for its operation on the network ratings assigned, my first comment is to ask the FCC to make findings as to whether any of the four TV shows in question, or rather, all four of them were correctly rated "TV-MA". I do not know. But all four shows met the objective criteria requiring a "TV-MA" rating (i.e., for adults only. So, if any of the shows were not rated "TV-MA" (i.e., were misrated or not rated at all by the network), the "V-chip", even if set by any parent to block all "TV-MA" programs, could not possibly have functioned at all to block those shows. Yet that is what petitioners are relying on in their claims.

II. The FCC's Omnibus Order contains an absolutely accurate summary of the law.

A. The First Amendment to the U.S. Constitution prohibits Congress from making any law that impairs free speech (but not expression, which is different).

B. Congress passed the statute against obscene or indecent radio broadcasts in I believe 1934. That has been applied to broadcast TV without any one raising any question.

C. In the Pacifica case, even though the statute makes no distinction as to time of day, the FCC took the position that indecent broadcasts had to be allowed during the daytime (for some reason that is not documented, given that there was no legal basis for that position). That left the Supreme Court with no option but to concede that indecent nighttime broadcasts are allowed, since the FCC conceded that (the other party in Pacifica had not even argued that, relying on other grounds).

D. Also in Pacifica, the U.S. Supreme Court held that the statute is constitutional, settling that as a matter of law. That has not changed. Essentially, we have "been there, done that" as far as challenging constitutionality. Since, the U.S. Courts of Appeals have held the same, so this is binding precedent. The courts and FCC are bound by this case law, and lack any power to deviate from it at all. Constitutionality of a law once established, does not change, because the Constitution does not change, unless amended in accordance with its procedures. Even the Supreme Court lacks any power to amend the Constitution.

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E. Contrary to the claims of petitioners, Pacifica and the Court of Appeals cases (Action for Childrens Television I and II, etc.) were not based on the assumptions that they claim in their court filings.

F. The constitutionality of a statute does not change based on factual developments such as technological advances. A court's job is to apply the law to the facts, not the opposite. The foundation of U.S. law is not the ever changing field of technology.

G. In fact, if the case law represented by Pacifica is subject to change, then the FCC's position of "time channeling" indecency in that case is also. If anything, the FCC should find that the indecency statute is constitutional "24/7", as should the courts, to return the law to the original Congressional intent from the 1930's. Whether a law is constitutional or not has nothing to do with time of day, or whether a majority of children are in the audience at the particular time. Constitutionality is however, based on the government's ability to police the public airwaves' usage. Of course, government has that power, as the airwaves belong to the public (the listeners and viewers), not the networks, again as settled law. The airwaves go into the sanctity of every American home.

III. The U.S. Supreme Court has also found that there is a First Amendment right to be free of unwanted speech.

IV. Per the Action for Children's Television cases, blocking technology is only a basis for finding unconstitutionality if the blocking technology is provided free of charge to the viewer by the industry. Applying that law to this case, in order to rely on blocking technology, the petitioner networks would have to permanently pay for every viewers' television sets, or for a "V-chip" for every household.

V. The only ^{block} for broadcast TV is the "V-chip". This case is about broadcast TV, and has nothing to do with cable or satellite TV. Even if 99% of homes had cable or satellite, the matter has to be decided based only on blocking technology in the homes that do not, i.e., the V-chip.

VI. In the discussions and Congressional hearings that led to the "V-chip" legislation, the petitioner networks (all of them) and Congress agreed unanimously that the "V-chip" was to

supplement, not supplant, the indecency statute. All of the petitioners made binding promises to Congress that they would never come back and do what they are in fact doing now, if they in fact challenge the constitutionality of the statute.

VII. If any statute is unconstitutional, it is the more recent and narrow "V-chip" legislation, which impairs speech by mandating technology that impairs speech.

VIII. I ask the FCC to find that as sacred as homes are, the public broadcast airwaves go via TV and radio to other places, like schools (for all ages), nursing homes, restaurants, lodging places, stores, taverns, correctional facilities, juvenile homes, etc. The petitioners completely fail to say how people are to use the "V-chip" to protect their children and themselves from indecency (even the most brief en-counters with unwanted indecency, per every person's absolute right to avoid even brief glimpses, as established by the Supreme Court), when they go into such places. The "V-chip" is not any kind of panacea at all. It cannot even possibly be argued by anyone that people have to choose to risk glimpsing indecency just to go to a school, restaurant, store, or other public place. Such an argument would run exactly contrary to the Supreme Court rulings in Pacifica and other cases.

IX. The "V-chip", which petitioners now might try to argue to the courts renders the indecency statute unconstitutional, does not even work. That is because it operates to block shows based only on the TV ratings. Many programs such as news shows are not even rated. Petitioners fail completely to explain how the "V-chip" will protect people from indecency in unrated shows. Further, the TV programs are rated by PETITIONERS themselves. So, the petitioners seek to have all laws voided in favor of a system entirely within their control, with no legal accountability to anyone, oversight by anyone, or remedy for anyone. Since the indecency laws are what is protecting people from petitioners, of course, they want those laws eliminated. They would not even be accountable when they misrate the programs upon which the "V-chip" is based, so there would be no protections at all. What petitioners seek is exactly analogous to all the nation's criminals suing in court for a finding that all criminal laws are unconstitutional, in favor of a new system that gives the criminals complete control over everyone, as their victims, so that they can perpetrate as much as they want, without having to face any consequences.

Petitioners seek the ultimate "foxes guarding the henhouse" situation in their favor, so that they can "eat all the hens without any fear of possible consequences". This is an absolutely bone chilling prospect. The petitioners already completely disregard all viewer comments as to programming. They do not even mail back personal replies to viewer comment letters. If all the laws are stricken, they will never answer to anyone for anything, and will do anything they want, without any self restraint.

X. The networks ratings have been studied comprehensively for error. The results, which the networks have not disputed, and in fact, tacitly admit to, show that the error rate is over 70%. That's right - over 70%. In other words, compared to the clear, objective ratings criteria upon which they are supposed to be based, over 70% of the TV programs rated and aired since the ratings started have been mis-rated. Further, of that over 70%, 100% of the error rate is in rating programs as being suitable for children younger than they really are suitable for according to the criteria. Many times the networks do this deliberately to circumvent the "V-chip", so that their shows and the advertisements are not blocked. So, the petitioners, the same networks that mis-rate the programs the "V-chip" is based on, and use that power to circumvent the "V-chip", in order to destroy the innocence of children, assault unconsenting adults, and keep ad revenues from being blocked, ~~and~~ ^{are} now asking the courts to strike down the indecency law, so that no one can stop them.

As just one example of mis-rating, I personally observed a few years ago a movie on ABC TV in which numerous men and women were shown fully, frontally nude, including men's sex organs, and ABC had the unbelievable audacity to rate it TV-14, as if somehow it is ever o.k. for 15 year old girls to see a bunch of men's penises. When I wrote to ABC, they completely refused to respond to me about this mis-rating.

XI. Per the surveys, for the above reasons, the "V-chip" does not work, and only 4% of American parents use it.

XII. "V-chips" only exist in newer TV's. Many people, including myself, do not have any blocking technology anyway (as much as 20 %) and rely on the indecency law as their ONLY protection. It is not the constitutional burden of myself or any viewer to have to buy a new TV or even a set-top box just to obtain a "V-chip" to avoid indecency. It is the petitioners' constitutional and legal burden not to broadcast it.

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XIII. If the indecency law were struck down, the Janet Jackson Super Bowl incident will be nothing compared to the relentless tidal wave of hard core pornography that all four petitioner networks will unleash on every child, woman, and man in America in their own homes, without any defense possible. Of course, the petitioners would dishonestly deny this and would not do it all of a sudden, but gradually.

XIV. The public airwaves are a public place, absolutely indistinguishable in every way from public roads, streets, highways, sidewalks, parks, etc., and must be treated the same way legally to reflect reality. I request a specific FCC finding of this fact.

XV. As someone else pointed out, the broadcasters' position is exactly analogous to air polluters saying that air pollution laws are no longer constitutional because there are now gas masks that people can buy and wear in public.

XVI. A substantial and increasing percentage of parents do not supervise their children at all. I see this in my job almost every day. Just as government has a legitimate interest in protecting children from parental abuse and neglect, the government and networks have an equal responsibility with parents to minimally protect children from indecency. With parents who do not use blocking technology for any reason, the government and networks share the responsibility to do all possible to protect those parents' children, for the childrens' sake.

XVII. The position of petitioners is what is commonly seen in court by criminals. Instead of accepting responsibility for their own behavior, they try to blame it on the law as being the problem that should be changed.

XVIII. If the "V-chip" will result in the indecency statute being found now unconstitutional, Congress must instead repeal the V-chip statute. The courts cannot stop Congress from repealing a law.

Thank you so much to the FCC for considering these comments and putting them in to the record. If I can be of any assistance, please contact me.

Sincerely,



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